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13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,) **GOVERNMENT'S RESPONSE IN OPPOSITION**
16 Plaintiff,) **TO DEFENDANT'S MOTIONS:**
17 v.) **1) COMPEL DISCOVERY; AND,**
18) **2) GRANT LEAVE TO FILE FURTHER**
19) **MOTIONS.**
20 HAMILTON SILVA-VASQUEZ,)
21 Defendant.) CASE: 08CR2424-BTM
22) JUDGE: HON. BARRY TED MOSKOWITZ
23) COURT: COURTROOM 15
24) DATE: AUGUST 29, 2008
25) TIME: 8:30 a.m.
26)
27) TOGETHER WITH STATEMENT OF FACTS
28) AND MEMORANDUM OF POINTS AND
29) AUTHORITIES

30 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through
31 its counsel, Karen P. Hewitt, United States Attorney, and Christopher
32 P. Tenorio, Assistant United States Attorney, and hereby files its
33 response and opposition to Defendant's above-referenced motions. Said
34 response is based upon the files and records of the case, together
35 with the attached Statement of Facts and Memorandum of Points and
36 Authorities.

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1 I.
22 STATEMENT OF FACTS3 A. PRESENT OFFENSE

4 On June 29, 2008, at approximately 2:54 a.m., Defendant Hamilton
5 Silva-Vasquez applied for entry into the United States at the
6 pedestrian primary lanes at the San Ysidro Port of Entry. Defendant
7 told Customs and Border Protection (CBP) Officer Ivonne Garcia that
8 he had lost his identification documents in Mexico but claimed to be
9 a Permanent Resident of the United States. Officer Garcia referred
10 Defendant to secondary inspection.

11 In secondary inspection, CBP Officer Sa. Guzman processed
12 Defendant's fingerprints through the Integrated Automated Fingerprint
13 Identification System (IAFIS) and obtained Defendant's true name and
14 criminal record. Additional inquiries into the Immigration Central
15 Index System (CIS), and Deportable Alien Control System (DACS)
16 revealed that Defendant has no legal immigration status in the United
17 States and was previously deported on May 9, 2003.

18 At approximately 4:40 p.m., CBP Officers J. James and N. Gonzales
19 advised Defendant of his Miranda rights in English. Defendant stated
20 he understood his rights and was willing to waive his rights and
21 answer questions. Defendant appeared lucid, did not appear to be ill,
22 intoxicated, or under the influence of drugs. Defendant was alert,
23 responsive, and appeared capable of communicating - as evidenced by
24 his appropriate responses to questions. Defendant did not appear to
25 be unusually nervous or fearful. The interview was video-recorded.

26 Defendant admitted that he did not have documents to enter the
27 United States, that he is a citizen of El Salvador by virtue of birth,
28 that he had been released from jail approximately one week prior, and

1 was deported to Mexico.

2 Defendant was subsequently indicted on April 23, 2008 for
3 Attempted Entry After Deportation, in violation of Title 8, United
4 States Code, Section 1326(a) and (b).

5 **B. PRIOR HISTORY**

6 **1. Criminal History**

7 Defendant's prior criminal convictions include the following.
8 In 1991, Defendant was convicted of Possession of an Assault Weapon
9 (felony), in the Los Angeles County Superior Court. Defendant was
10 sentenced to two-years' custody in prison.

11 In 1991, Defendant was convicted of Shooting at an Inhabited
12 Dwelling, and Possession of an Assault Weapon, in the Los Angeles
13 County Superior Court. Defendant was sentenced to three-years'
14 custody in prison.

15 Additionally, in 1996, Defendant was convicted of Discharging a
16 Firearm from a vehicle, for which he received 16 months' custody in
17 prison. In 2003, Defendant was convicted of Corporal Injury and
18 Assault with a Deadly Weapon, for which received 423 days in jail.
19 In 2008, he was convicted and jailed for being under the influence of
20 a controlled substance.

21 **2. Immigration History**

22 Defendant was previously ordered deported by an Immigration Judge
23 on May 6, 1997. The deportation order was subsequently reinstated and
24 Defendant was deported on January 28, 2000 and May 9, 2003.

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II.

THE GOVERNMENT WILL PROVIDE DISCOVERY AS PROVIDED HEREIN

Except as described below, the Court should deny Defendant's discovery requests.

1. Rule 16(a)(1)(A) : Defendant's Statements

The Government has disclosed all known written and statements of the Defendant and the substance of oral statements made by the Defendant in response to questions by government agents in this case.

2. Documents, Arrest Reports, and Tangible Evidence

In accordance with obligations under Rule 16(a)(1)(C) and 16(c),
the Government will permit the Defendant to inspect and copy or
photograph all books, papers, documents, photographs, tangible
objects, buildings, or places, or portions thereof, which are within
or may come within the possession, custody, or control of the
Government, and which are material to the preparation of the
Defendant's defense or are intended for use by the Government as
evidence-in-chief at trial or were obtained from or belong to the
Defendant.

3. Rule 16, and Brady: For Exculpatory Evidence

The Government is well aware of, and will fully perform, its duty under, Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). Accordingly, the Government will disclose exculpatory evidence within its possession that is material to the issue of guilt. Defendant is not entitled to all evidence known or believed to exist which is, or may be, favorable to the accused, or which pertains to the credibility of the Government's case. As the Ninth Circuit Court of Appeals stated in United States v. Gardner, 611 F.2d 770 (9th Cir. 1980):

1 [T]he prosecution does not have a constitutional duty to
 2 disclose every bit of information that might affect the
 3 jury's decision; it need only disclose information
 4 favorable to the defense that meets the appropriate
 5 standard of materiality.

6 Id. at 774-75 (citations omitted). See also United States v.
 7 Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (the Government is not
 8 required to create non-existent exculpatory material); United States
 9 v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not create
 any pretrial discovery privileges not contained in the Federal Rules
 of Criminal Procedure).

10 **4. Rule 16, and Brady: For Sentencing**

11 The Government is also well aware of, and will fully perform, its
 12 duty under Brady v. Maryland, 373 U.S. 83 (1963) and United States v.
 13 Agurs, 427 U.S. 97 (1976) regarding evidence pertaining to punishment.
 14 Accordingly, and consistent with its position stated above, the
 15 Government will disclose exculpatory evidence within its possession
 16 that is material to the issue of punishment.

17 **5. Rule 16(a)(1)(A), (B), and (C): Prior Record**

18 The Government has already provided Defendant with arrest
 19 reports, judgment and conviction documents for prior offenses and
 20 other evidence of prior bad acts pursuant to Rules 16(a)(1)(A), (B)
 21 and (C).

22 **6. Rule 16(a)(1)(C) and Fed. R. Evid. 404(b): Prior**
Arrests, Convictions Or Bad Acts

23
 24 The Government reserves the right to introduce such prior bad
 25 acts, and will address such evidence and its intentions in motions in
 26 limine to be filed separately according to the Court's scheduling
 27 orders.

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1 **7. Rule 16(a)(1)(C) : Evidence Seized**

2 In accordance with obligations under Rule 16(a)(1)(C) and 16(c),
3 the Government will permit the Defendant to inspect and copy or
4 photograph all books, papers, documents, photographs, tangible
5 objects, buildings, or places, or portions thereof, which are within
6 or may come within the possession, custody, or control of the
7 Government, and which are material to the preparation of the
8 Defendant's defense or are intended for use by the Government as
9 evidence-in-chief at trial or were obtained from or belong to the
10 Defendant.

11 **8. Henthorn Material**

12 Pursuant to United States v. Henthorn, 831 F.2d 29, 30 (9th Cir.
13 1991), the Government will comply with its responsibilities to review
14 the personnel files of its agents who may serve as witnesses; and the
15 Government will disclose any impeachment information regarding
16 criminal investigations. The Government is presently unaware of any
17 criminal involvement by any prospective government witness, or that
18 any prospective government witness is under investigation. The
19 Government objects to Defendant's request that the Assistant United
20 States Attorney personally review all personnel files of prospective
21 witnesses.

22 **9. Expert Witnesses**

23 The Government will meet obligations pursuant to Fed. R. Crim.
24 P. 16(a)(1)(E) to disclose information regarding expert witnesses.
25 The Government anticipates presenting testimony of a fingerprint
26 examination expert witness who will identify Defendant's fingerprints
27 on documents from his A-file. The Government will produce details
28 regarding the nature of the expert's testimony, and the qualifications

1 of the expert when a trial date is scheduled and any expert is
2 obtained.

3 **10. Impeachment Evidence**

4 The Government is unaware of any impeachment evidence of a
5 prospective government witness is biased or prejudiced against
6 Defendant. The Government is aware of, and will comply with, its
7 obligations regarding impeachment evidence pursuant to Brady v.
8 Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97
9 (1976).

10 **11. Evidence of Criminal Investigations of Witnesses**

11 The Government is currently unaware of any pending criminal
12 investigations against a prospective government witness is biased or
13 prejudiced against Defendant. The Government will comply with its
14 obligations under Brady v. Maryland, 373 U.S. 83 (1963) and provide
15 such evidence if and when it becomes known.

16 **12. Evidence of Bias, Motive to Lie of Government
Witnesses**

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18 The Government is unaware of any evidence indicating that a
19 prospective government witness is biased or prejudiced against
20 Defendant. The Government is also unaware of any evidence that
21 prospective witnesses have a motive to falsify or distort testimony.
22 The Government is aware of, and will comply with, its obligations to
23 provide such evidence pursuant to Brady v. Maryland, 373 U.S. 83
24 (1963), and United States v. Agurs, 427 U.S. 97 (1976)

25 **13. Evidence of Criminal Investigation of Witnesses**

26 The Government is unaware of any evidence indicating that a
27 prospective government witness is currently under criminal
28 investigation by the Government.

1 **14. Evidence Affecting Perception, Recollection, Ability**
2 **to Communicate, or Veracity**

3 As addressed in items 12-14 above, the Government is unaware of
4 any evidence affecting the perception, recollection, ability to
5 communicate, or veracity of any prospective Government witness. The
6 Government will provide such evidence pursuant to Brady v. Maryland,
7 373 U.S. 83 (1963), if and when it comes to light.

8 **15. The Government Is Unaware of Favorable Defense**
9 **Witnesses**

10 The Government is unaware of any witness who made a favorable
11 statement concerning the Defendant, or of any statement that may be
12 favorable to Defendant's defense, which have not already been provided
13 in discovery.

14 **16. Jencks Act**

15 Consistent with the Jencks Act, 18 U.S.C. § 3500, the Defendant
16 is not entitled to disclosure of witness statements prior to the
17 witness testifying on direct examination at trial. The Government
18 must produce these statements only after the witness testifies on
19 direct examination. United States v. Taylor, 802 F.2d 1108, 1118 (9th
20 Cir. 1986); United States v. Mills, 641 F.2d 785, 790 (9th Cir. 1981).
21 Indeed, even material believed to be exculpatory and, therefore,
22 subject to disclosure under the Brady doctrine, if contained in a
23 witness statement subject to the Jencks Act, need not be revealed
24 until such time as the witness statement is disclosed under the Act.
25 See United States v. Bernard, 623 F.2d 551, 556 (9th Cir. 1979).

26 The Government reserves the right to withhold the statements of
27 any particular witnesses until after they testify. However,
28 notwithstanding any statements the Government deems necessary to

1 withhold, the Government will disclose witness statements prior to
2 trial in as timely a manner as practicable, provided defense counsel
3 has complied with his obligations under Rules 12.1, 12.2, 16 and 26.2
4 of the Federal Rules of Criminal Procedure, and provided that defense
5 counsel submitted all reciprocal discovery and "reverse Jencks"
6 statements.

7 The Government will comply with its Rule 26.2 obligation to
8 produce for the Defendant's examination statements of witnesses in the
9 Government's possession after, or shortly before, such witnesses
10 testify on direct examination. The Government objects to the
11 Defendant's request that such statements be produced at this time.
12 Similarly, if Rule 12(i) becomes relevant pursuant to suppression
13 proceedings, the Government will comply with obligations to produce
14 statements in accordance with Rule 26.1.

15 **17. The Government Will Comply With *Giglio***

16 The Government has not made any promises, express or implied, to
17 any government witnesses in exchange for their testimony in this case.
18 Therefore, the Government is currently unaware of any discoverable
19 impeachment information pursuant to Giglio v. United States, 405 U.S.
20 150 (1972).

21 **18. Agreements Between the Government and Witnesses**

22 Consistent with its obligations pursuant to Giglio, stated above,
23 the Government will provide any agreements with witnesses. To date,
24 however, none exist.

25 **19. Informants and Cooperating Witnesses**

26 Consistent with its acknowledged obligation to provide discovery
27 of prospective witnesses' statements, the Government would provide the
28 requested evidence. To date, however, the Government has not employed

1 | any informants or cooperating witnesses in the present case.

III.

3 THIS COURT SHOULD CONDITIONALLY GRANT LEAVE TO FILE FURTHER MOTIONS

4 Although the Government does not oppose in principle Defendant's
5 request to file further motions, the Government would oppose the
6 filing of any further substantive motions that would not be
7 entertained by the court until the time set aside for motions in
8 limine. If the defendant foresees the need to file further
9 substantive motions, the Government respectfully requests that the
10 defendant request, and the Court set, a separate date for an
11 additional motion hearing, and that any motions in limine and trial
12 not be set until the conclusion of such hearing.

IV.

CONCLUSION

15 Based on the foregoing, the Court should deny Defendant's motions
16 except where otherwise noted regarding his requests for discovery and
17 leave to file further motions.

18 DATED: August 14, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s / Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) **CERTIFICATE OF SERVICE**
Plaintiff,) CASE: 08CR2424-BTM
v.) JUDGE: HON. BARRY TED MOSKOWITZ
HAMILTON SILVA-VASQUEZ,) COURT: COURTROOM 15
Defendant.)
_____)

IT IS HEREBY CERTIFIED that:

I, CHRISTOPHER P. TENORIO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS** on **Erick L. Guzman, Esq.** by electronically filing the foregoing with the Clerk of the District Court using its ECF System.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2008

Respectfully submitted,

s/Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney